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WANG KANG XIANG v. HEE CHAI HUI

HIGH COURT MALAYA, JOHOR BAHRU
AHMAD MURAD ABDUL AZIZ JC
[CIVIL APPEAL NO: JA-12BNCVC-16-12-2020]
10 APRIL 2022

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Abstract – *The award of RM150,000 as general damages and RM100,000 as exemplary damages against the defendant for breach of promise to marry is flawed and needed to be reassessed. The issue of quantum aside, awarding punitive damages in the absence of clear aggravating circumstances or reprehensible conduct on the part of the defendant is unwarranted and uncalled for; the trial court had thus erred in awarding exemplary damages. The award of general damages too had not factored in the defendant's means, or that it could cause the defendant financial ruin, or that it was manifestly disproportionate to his culpability; it ought to be reduced to RM50,000.*

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CONTRACT: *Marriage – Breach – Breach of promise to marry – Relationship irretrievably broken down before date of registration of marriage – Conduct of plaintiff – Whether contributed to defendant's loss of interest in pursuing marriage – Claim for damages – Factors considered – Whether there was evidence of aggravating conduct by defendant – Whether award of exemplary damages without justification – Whether award of general damages excessive and disproportionate to culpability of defendant – Whether award of damages ought to be reduced or set aside*

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DAMAGES: *Quantum – General and exemplary damages – Breach of promise to marry – Factors considered – Financial means – Conduct of plaintiff – Whether contributed to defendant's loss of interest in pursuing marriage – Whether there was evidence of aggravating conduct by defendant – Whether award of exemplary damages without justification – Whether award of general damages excessive and disproportionate to culpability of defendant – Whether award of damages ought to be reduced or set aside*

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The respondent ('plaintiff') was a single mother who had befriended the appellant ('defendant') sometime in 2002 on Facebook. In February 2018, the plaintiff divorced her husband and soon after, the plaintiff and the defendant became a couple. In that same year, on the invitation of the plaintiff, the defendant moved in with the plaintiff at her father's home. Subsequently, the plaintiff told the defendant that she had become pregnant with the defendant's child. The plaintiff said that the defendant had promised to marry her upon being told of the pregnancy and the defendant did not dispute this and thus, they began preparations for the marriage. On the date set for their appointment before the marriage registrar to register their marriage, the plaintiff turned up with her father, whereas the defendant failed

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to turn up. The parties started quarrelling and exchanging acrimonious WhatsApp messages after setting the date for the registration of their marriage, with both parties accusing the other of being unreasonable and mean to the other. The exchanges showed that the relationship had irretrievably broken down. The defendant's statement 'tak payah didaftarkan perkahwinan, majlis pun dibatalkan sahajalah' and the plaintiff's reply 'Anak?' suggested that she accepted that their relationship had ended. The plaintiff's statement saying 'sila pulang rumah kamu' clearly meant that she wanted the defendant out of the house. The Sessions Court Judge ('SCJ') allowed the plaintiff's claim against the defendant for an alleged breach of promise to marry and awarded RM150,000 as general damages and RM100,000 as exemplary damages. Hence, the defendant appealed.

Held (dismissing defendant's appeal against liability; allowing defendant's appeal on quantum):

(1) The plaintiff was still married to her then husband when the plaintiff and the defendant were communicating *via* text messages. Almost immediately after her divorce, the plaintiff invited the defendant to live with her in her father's house. Evidently, the plaintiff should have no difficulty finding a spouse. The plaintiff was already a divorcee with a child when the promise of marriage was made by the defendant, upon discovering that the plaintiff was pregnant with his child. Therefore, the Sessions Judge's finding that the plaintiff had diminished prospects of getting married again was plainly wrong. (para 19)

(2) The conduct of the plaintiff itself could not be said to be entirely un-blameworthy and did not contribute to the defendant's loss of interest in pursuing the marriage. This was evident in the exchange of WhatsApp messages before the proposed registration date. The SCJ misdirected himself when he took into account the fact that the plaintiff was pregnant and would have to support the child without financial help from the defendant. Child support is a totally different issue, which should not be factored in when considering damages for breach of promise to marry. There were other avenues available for the plaintiff to claim child support, including under the provisions of the Married Women and Children (Maintenance) Act 1950. (paras 20 & 21)

(3) Among the factors to be considered when awarding damages is the defendant's means. The defendant was a small-time contractor and such large awards totalling RM250,000 would most likely cause him financial ruin from which he would probably not recover for a long time. Again, the SCJ misdirected himself when he failed to consider the defendant's financial condition when making the award for general and exemplary damages. In particular, the award of exemplary damages was

totally without justification as there was no evidence of aggravating conduct by the defendant in this case. With respect to exemplary damages, the SCJ had erred in making such an award. (para 22)

(4) The award of general damages appeared excessive and disproportionate to the culpability of the defendant. The SCJ appeared to have put all the blame for the aborted proposed marriage on the defendant. The SCJ failed to consider the conduct of the plaintiff as a contributing factor in the breakdown of the relationship. The SCJ did not have sufficient appreciation of the evidence as a whole in awarding the amount of general damages as well as exemplary damages, which were manifestly disproportionate to the culpability of the defendant. Furthermore, there was no evidence nor any allegation by the plaintiff of reprehensible conduct by the defendant to support a high and excessive award of general damages against the defendant. Thus, this court reduced the general damages awarded to RM50,000 and set aside the award of exemplary damages by the SCJ. (paras 19, 23 & 24)

Case(s) referred to:
Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd [2008] 5 CLJ 737 CA ***(refd)***
Dennis v. Sennyah [1963] 1 LNS 26 HC ***(refd)***
Nafsiah v. Abdul Majid (No 2) [1969] 1 LNS 114 HC ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
RS Thanalachimi v. Sundararaju Mattaya [2011] 7 CLJ 197 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 22(4)
Married Women and Children (Maintenance) Act 1950, s. 3(2)

For the appellant - Chang Tau Sian; M/s Henry Soong & Chang
For the respondent - Foo Hiap Choong & Chew Kok Wee; M/s Low & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Murad Abdul Aziz JC:

Introduction

[1] This is the appellant/defendant's appeal against the decision of the Sessions Judge who allowed the respondent/plaintiff's claim against the defendant for an alleged breach of promise to marry. The Sessions Judge allowed the plaintiff's claim and awarded RM150,000 general damages and RM100,000 as exemplary damages. The parties will be referred to as they were in the Sessions Court below.

[2] After hearing submissions by the parties, I dismissed the defendant's appeal against liability but allowed the defendant's appeal on quantum. I reduced the quantum of general damages from RM150,000 to RM50,000 and set-aside the award for exemplary damages. Since the defendant did not appeal against my decision on liability, I shall confine my grounds to only the issue of quantum.

Background Facts

[3] The plaintiff was a single mother who had befriended the defendant some time in 2002 and who occasionally, exchanged messages with the defendant on Facebook.

[4] Some time in February 2018, the plaintiff divorced her husband. Soon after, according to the plaintiff, she and the defendant became a couple.

[5] At some point in 2018, on the invitation of the plaintiff, the defendant moved in with the plaintiff at her father's home. In October 2018, the plaintiff told the defendant that she had become pregnant with the defendant's child. The plaintiff says that the defendant had promised to marry her upon being told of the pregnancy and the defendant did not dispute this and thus, they began preparations for the marriage.

[6] They also made preparations to take photographs, in preparation for what was supposed to be a joyous occasion.

[7] On the date set for their appointment before the marriage registrar ("SP3") to register their marriage, which was 14 February 2019 (ironically Valentine's Day), the plaintiff turned up with her father, whereas the defendant failed to turn up.

[8] It is in evidence that the parties started quarrelling and exchanging acrimonious WhatsApp messages after setting the date for registration of their marriage, with both parties accusing the other of being unreasonable and mean to the other.

[9] The continuous acrimony culminated in the last WhatsApp communication between the parties on 13 January 2019, which was one month before the date of registration of the marriage. The WhatsApp exchange is reproduced below *verbatim*:

13 Januari 2019

Defendan : Asyik bising-bising, hal yang ada tak ada sahaja, kamu nak cari topik untuk bising, saya sudah mati hati, kamu nak kembali menjadi bujang, seperti yang kamu inginkan, **tak payah daftarkan perkahwinan, majlis pun dibatalkan sahajalah!**

A Asyik terumbang-ambing seperti ini, **rungutan kamu semakin hari semakin banyak, semakin melampau, tiada makna untuk bersama lagi!**

Plaintif : Anak?

Defendan : Kamu lahirkan dia, saya bela, kamu dalam pantang, duit sara hidup saya bagi.

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Dia adalah tanggungjawab saya, kamu jagalah kandungan kamu dengan baik.

Untuk beberapa bulan ini saya tanggung.

C Stok saya akan pindah semua balik ke rumah.

Plaintif : Kamu masih anggap kamu sikit pun tak bersalah, semua salah saya. Untuk mengaku salah dan meminta maaf pun kamu tidak dapat lakukan. **Kamu ni memang bukan lelaki langsung.**

D Defendan : Tidak perlu nak gaduh dengan kamu, itu sahaja lah.

Plaintif : Wang Kang Xiang **sila pulang rumah kamu** dan datang ke rumah saya untuk settle. (emphasis added)

[10] The above exchange shows that the relationship had irretrievably broken down. The defendant's statement, "tak payah didaftarkan perkahwinan, majlis pun dibatalkan sahajalah", and the plaintiff's reply, "anak?", suggests that she accepted that their relationship had ended. The plaintiff's statement saying, "sila pulang rumah kamu", clearly means she wanted the defendant out of the house.

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F **[11]** Since the Sessions Judge had the benefit of hearing the oral evidence at the trial, I find there is no sufficient reason for this court to disturb the finding of facts by the Sessions Judge on liability. However, on the issue of quantum, I find that the Sessions Judge had failed to sufficiently appreciate the evidence given by the parties at the trial. The above exchanged messages, before the registration of the marriage, needs to be considered to give context to the amount of damages awarded by the Sessions Judge.

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The Law

[12] It is an accepted fact that a breach of promise to marry as a cause of action has been abolished in its country of origin. The Law Reform (Miscellaneous Provisions) Act 1970 of the United Kingdom, which came into effect on 1 January 1971, provides:

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> An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement.

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Likewise, the law has been abolished in Australia and New Zealand.

[13] Since this cause of action has its basis in the common law, one has to look to the older English cases for guidance on the principles applicable in awarding damages.

The Malaysian courts took guidance from earlier English cases and in *Dennis v. Sennyah* [1963] 1 LNS 26; [1963] 1 MLJ 95, the following principle was enunciated by the court in assessing damages:

> In assessing damages the injury to the affections of the plaintiff, **the prejudice to his or her future life and prospects of marriage,** the rank and condition of the parties and **the defendant's means** are all matters to be taken into consideration. (emphasis added)

The court also opined:

> No measure of damages can be laid down, save that, while in **aggravating circumstances** the damages may be at large, they should not be fixed as though they were a fine. (emphasis added)

[14] The Sessions Judge took into account the following factors in awarding both general damages and exemplary damages:

> [29] Di dalam kes ini adalah merupakan fakta-fakta yang tidak dinafikan dan dipertikaikan iaitu:
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> (v) Defendan (SD-1) telahpun mengemukakan Borang Permohonan, Pemberitahuan Perkahwinan dan Akuan Kanun Bertulis (Ekshibit "P-2") kepada Jabatan Pendaftaran Negara ("JPN") untuk pendaftaran perkahwinan pada 14/2/2019;
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> (vi) Plaintif (SP-1) telah membuat penyediaan untuk perkahwinan tersebut, iaitu menyediakan hadiah perkahwinan (Ekshibit "P-6"), mengambil gambar perkahwinan dengan Defendan (Ekshibit "P-4") dan juga menempah jamuan perkahwinan serta memberi kad jemputan perkahwinan (Ekshibit "P-3") kepada saudara mara dan kawan-kawan di mana tarikh jamuan perkahwinan tersebut telah ditetapkan pada 17/2/2019.
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> (vii) Plaintif (SP-1) dan Defendan (SD-1) telahpun bersekedudukan dan tinggal bersama serta telah mempunyai hubungan yang mesra, rapat dan intim sehingga menyebabkan Plaintif telah hamil dan melahirkan anak Defendan pada bulan Oktober 2018 semasa Defendan (SD-1) tinggal di rumah bapa Plaintif.
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> (viii) Plaintif terpaksa menyara anak Defendan secara sendiri dan terpaksa menanggung segala perbelanjaan bagi anak Defendan tersebut di mana Defendan langsung tidak pernah bertanggungjawab dan tidak pernah memberikan apa-apa atau sebarang sumbangan untuk perbelanjaan seharian terhadap anak Defendan tersebut;

A (ix) Plaintif berada dalam situasi yang amat memalukan dan melukakan hati serta harga diri Plaintif akibat perbuatan Defendan yang tidak menghadirkan diri pada tarikh pendaftaran perkahwinan tersebut pada 14/2/2019; dan

(x) Plaintif telahpun mengalami tekanan perasaan, gangguan
B emosi, kesakitan dan penderitaan seumur hidup di mana ianya telah menyebabkan Plaintif mempunyai atau mengalami "fobia" untuk mengenali dan mengadakan hubungan yang rapat dengan mana-mana teman lelaki yang baru dan ini telah melucutkan prospek Plaintif untuk berkahwin pada masa-masa akan datang atau hadapan.

C **[15]** The Sessions Judge took guidance from the decision in *RS Thanalachimi v. Sundararaju Mattaya* [2011] 7 CLJ 197 in granting the sums of RM150,000 and RM100,000 as general damages and exemplary damages respectively. However, there is very little similarity between the facts in *RS Thanalachimi* and the present case. In *RS Thanalachimi*, the facts
D show that the plaintiff was residing and working in London when the defendant courted her and proposed marriage. The plaintiff, relying on the defendant's promise to marry her, gave up her lucrative job, voluntarily surrendered her home to the mortgagee, and left England for Singapore, where the engagement ceremony was conducted on 18 October 1992 and
E followed by an actual traditional Hindu wedding ceremony in Teluk Intan, Perak. The Hindu wedding ceremony was not officiated by the Registrar of Marriage and the marriage was not registered. Thus, the marriage was void in law pursuant to s. 22(4) of the Law Reform (Marriage and Divorce) Act 1976. The defendant had wilfully misrepresented to the plaintiff that the
F traditional Hindu marriage was sufficient and valid in law.

[16] In reliance on that misrepresentation, the plaintiff had agreed to consummate the marriage. At the time of the Hindu wedding ceremony, the plaintiff was a single woman who was lured into consummating the "marriage" under false representation by the defendant. The defendant had
G promised to take the plaintiff to the United States of America ("USA"). After the Hindu wedding ceremony, the plaintiff was mistreated by the defendant's relatives. The defendant then left for the USA, without the plaintiff, at the end of November 1992. While in the USA, he discovered that the plaintiff would not be able enter the USA for a period of two years from the date of
H a valid and lawful marriage. The defendant then decided that the proposed marriage would not work, however he did not inform the plaintiff of his decision.

[17] The plaintiff then travelled to the USA to meet up with the defendant to resolve the issues between them, but the plaintiff was refused entry into
I the defendant's house. To aggravate the insult to the plaintiff, the defendant even filed a police report against the plaintiff, describing the plaintiff as his

girlfriend who broke into his home and caused property damage. The plaintiff was taken to hospital for psychiatric evaluation, and upon her discharge, the defendant still refused to let her into his home. The plaintiff then filed for maintenance in a California court and in the course of proceedings, found out for the first time that her "marriage" in Malaysia was not valid, thus, she could not sustain her claim in the California court. The plaintiff then discontinued her action in the USA and filed proceedings for breach of promise to marry in Malaysia.

[18] Thus, reading the facts of *RS Thanalachimi*, it is evident that the conduct of the defendant towards the plaintiff was reprehensible and there were plenty of aggravating circumstances to justify a high award of general damages. It should also be noted that despite the reprehensible conduct of the defendant and the suffering and anguish caused to the plaintiff, no punitive or exemplary damages were awarded to the plaintiff.

[19] (i) In contrast to the facts in *RS Thanalachimi*, there was no evidence nor any allegation by the plaintiff of reprehensible conduct by the defendant in the present case to support a high and excessive award of general damages against the defendant. One should note that while in *RS Thanalachimi* the plaintiff was a single woman who was lured into consummating the invalid marriage on a misrepresentation by the defendant, in the present case, the plaintiff was still married to her then husband when the plaintiff and defendant were communicating *via* text messages. And almost immediately after her divorce, the plaintiff invited the defendant to live with her in her father's house. This evidently shows the plaintiff should have no difficulty finding a spouse. The plaintiff was already a divorcee with a child when the promise of marriage was made by the defendant, upon discovering that the plaintiff was pregnant with his child. Therefore, the Sessions Judge's finding that the plaintiff has diminished prospects of getting married again is plainly wrong.

(ii) I am guided by the case of *Nafsiah v. Abdul Majid (No 2)* [1969] 1 LNS 114; [1969] 2 MLJ 175, where the facts are almost similar to this case. The plaintiff had a child by the defendant. The plaintiff alleges that she was seduced by the defendant and as a result of such seduction, she became pregnant and a son was born to her through the defendant on 29 July 1964. The plaintiff is a Muslim woman who fully realises that the defendant could have married her and divorced her at any time thereafter. She told the court that as a result of the birth which she gave to the child and which she maintains, is the child of the defendant, she did not suffer any handicap in marrying again. In this case the judge awarded general damages of RM1,200 only.

[20] The second noteworthy issue is that unlike the *RS Thanalachimi* case, the conduct of the plaintiff itself cannot be said to be entirely un-blameworthy and did not contribute to the defendant's loss of interest in pursuing the marriage. This is evident in the exchange of WhatsApp messages before the proposed registration date.

[21] The Sessions Judge misdirected himself when he took into account the fact that the plaintiff was pregnant and would have to support the child without financial help from the defendant. Child support is a totally different issue, which should not be factored when considering damages for breach of promise to marry. There are other avenues available for the plaintiff to claim child support, including under the provisions of the Married Women and Children (Maintenance) Act 1950. Section 3(2) of the above Act provides:

> (2) If any person neglects or refuses to maintain an **illegitimate** child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance, as to the court seems reasonable. (emphasis added)

[22] Among the factors to be considered when awarding damages, as laid down in *Dennis v. Sennyah* (*supra*), is the defendant's means. In this case, the defendant is a small-time contractor and such large awards totalling RM250,000 would most likely cause him financial ruin from which he will probably not recover for a long time. Again, the Sessions Judge misdirected himself when he failed to consider the defendant's financial condition when making the award for general and exemplary damages. In particular, the award of exemplary damages is totally without justification as there is no evidence of aggravating conduct by the defendant in this case. Even in the case of *RS Thanalachimi*, the court did not award any exemplary or punitive damages. With respect to exemplary damages, the learned Sessions Judge has again erred in making such an award. The general principles under which the court may award exemplary damages has been laid down by the Court of Appeal in *Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd* [2008] 5 CLJ 737; [2008] 5 MLJ 34, where the Court of Appeal had referred to the English case of *Rookes v. Barnard* [1964] AC 1129 as follows:

> [46] This aspect of the appeal is also related to the claim for exemplary damages. In *Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors and another appeal* [2005] 6 MLJ 540 the Court of Appeal in addressing the issue of exemplary damages stated, *inter alia*, per Gopal Sri Ram JCA:
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> > ... Exemplary damages are only awarded in **very special circumstances.** These circumstances are contained in the speech of Lord Devlin to which we have already referred, that no new categories are admissible to the Devlin list has now been settled in the decision of the House of Lords in *Cassell & Co Ltd v. Broome* [1972] AC 1027.

[47] There are three categories of cases in which exemplary damages may arise. Out of the three it is unquestionable that the first and third categories are absolutely inapplicable and hence irrelevant to mention. The second category in the words of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 (ref) case is as follows:

> The defendant's conduct has been calculated by him to **make a profit** for himself which may exceed the compensation payable to the plaintiff. (emphasis added)

Thus, it is clear that exemplary damages are not applicable to the present case.

[23] The award, of general damages to me, appears excessive and disproportionate to the culpability of the defendant. The Sessions Judge appears to have put all the blame for the aborted proposed marriage on the defendant. The Sessions Judge failed to consider the conduct of the plaintiff as a contributing factor in the breakdown of the relationship. It is my finding that the Sessions Judge did not have sufficient appreciation of the evidence as a whole in awarding the amount of general damages as well as exemplary damages, which are manifestly disproportionate to the culpability of the defendant.

Conclusion

[24] For the reasons aforesaid, I reduce the general damages awarded to RM50,000 and set aside the award of exemplary damages by the Sessions Judge. I make no order as to costs.